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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 372

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner

v.

GERALD SESSLIN,
Respondent

Petition for a Writ of Certiorari to the Supreme Court of the State of California

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No.--------

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner

v.

GERALD SESSLIN,
Respondent

Petition for a Writ of Certiorari to the Supreme Court of the State of California

Petitioner, the People of the State of California, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above-entitled case on April 10, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of California for the Second Appellate District, Division One, affirming respondent's conviction is set out in Appendix C and is reported as *People* v. *Sesslin* (1967) 252 A.C.A. 130; 60 Cal.Rptr. 30. The granting

of a hearing by the California Supreme Court on September 21, 1967, vacated that opinion. The opinion of the California Supreme Court reversing respondent's conviction is set out in Appendix B and is reported as *People* v. *Sesslin* (1968) 68 A.C. 431; 67 Cal.Rptr. 409; 439 P.2d 321.

JURISDICTION

The opinion of the Supreme Court of the State of California issued on April 10, 1968. Petitioner's application for rehearing was denied on May 9, 1968. The jurisdiction of this court is invoked under 28 U.S.C. 1257(3) and Rule 22 of the Revised Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Whether the Fourth Amendment's requirement that no warrants shall issue, but upon probable cause applies to State arrest warrants?

2. Whether a complaint showing on its face that it was issued by a district attorney who, under state law, may do so only when he has reasonable cause to believe the person charged guilty of a crime is sufficient to authorize issuance of an arrest warrant even when that complaint is couched in conclusionary terms?

3. Whether the holding of the California Supreme Court below is inconsistent with the holding of this Court in *Jaben* v. *United States* (1965) 381 U.S. 214.

4. Whether in light of *Wong Sun* v. *United States* (1963) 371 U.S. 471, the California Supreme Court

correctly held that respondent's freely given consent to the taking of the handwriting exemplars did not vitiate the effects of any illegality in the arrest?

STATUTES INVOLVED

The statutory provisions involved are set forth in Appendix A. They are:

Evidence Code section 664.
Government Code section 26501.
Penal Code sections 470, 487, and 995.
Philippine Bill of Rights, Article 5, 32 Stats. 691, 693.

STATEMENT

History of the Case

By an information filed February 15, 1966, in Los Angeles County Superior Court, the District Attorney of that county charged respondent Gerald Sesslin and codefendant Frank Wesley Wright Harper with seven counts of forgery in violation of California Penal Code section 470 and two counts of grand theft in violation of California Penal Code section 487 (CT 114–122) [1].

On February 15, 1966, respondent, with counsel present, was arraigned in Los Angeles County Superior Court; whereupon he moved to set aside the information pursuant to California Penal Code sec-

[1] CT refers to the Clerk's Transcript of the proceedings in the superior court below, which includes a transcript of the testimony taken at the preliminary hearing. A certified copy of said Clerk's Transcript is lodged with this Court.

tion 995 (CT 133). That motion was argued and denied on February 28, 1966, whereafter respondent pleaded not guilty to the charges set out in the information (CT 134).

On June 20, the cause was called for trial (CT 137). Respondent, personally, and all counsel, waived trial by jury (RT 4) [2]. By stipulation of counsel the case was submitted on the testimony contained in the transcript of the proceedings had at the preliminary hearing (CT 137, RT 4–5).

On August 5, 1966, the court heard defense counsel's argument that respondent's arrest upon a warrant was illegal in that the complaint supporting that warrant did not demonstrate probable cause and therefore handwriting exemplars obtained incident to respondent's arrest were inadmissible (RT 7–18).

On August 15, 1966, the court found respondent guilty of Count III which alleged forgery of a fictitious name in a check for $5,800.00 drawn upon the Central National Bank in Oklahoma City, Oklahoma. The court ordered the other counts dismissed (CT 116, 139, RT 26–27).

On September 21, 1966, respondent was sentenced to imprisonment in the Los Angeles County Jail for one year. Bail pending appeal was set at $2,000.00 (CT 140, RT 29–32). Notice of appeal was filed that same day (CT 141).

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[2] RT refers to the Reporter's Transcript of the proceedings in the superior court below, a certified copy of which is lodged with this Court.

On June 28, 1967, the Court of Appeal of the State of California for the Second Appellate District, Division One, affirmed the conviction (*People* v. *Sesslin* (1967) 252 A.C.A. 130; 60 Cal.Rptr. 30 Appendix C).

Respondent's petition for hearing by the California Supreme Court was granted on September 21, 1967 and on April 10, 1968, that Court reversed respondent's conviction (*People* v. *Sesslin* (1968) 68 A.C. 431; 67 Cal.Rptr. 409; 439 P.2d 321; Appendix B). On May 9, 1968, petitioner's application for rehearing was denied.

Factual Statement

On December 17, 1965, a check for $5,800.00 drawn upon the Central National Bank, Oklahoma City, Oklahoma directing payment to "Carol Owen," signed by "Norman Whitt" and endorsed by "Wallace C. King" was deposited to the account of Wallace C. King in the Commerce City Bank, City of Commerce, California (CT 41, 98).

William L. Bowman, an examiner of questioned documents in the employ of the Los Angeles County Sheriff's office, compared the handwriting on the check, the bank deposit slip and a handwriting exemplar executed by respondent after his arrest and concluded that respondent had forged the name "Wallace King" on the back of the check and that he had placed certain numbers on the right side and reverse side of the deposit slip (CT 92, 98, 102, 103). The check in question was subsequently returned un-

honored by the Central National Bank in Oklahoma (CT 52–54).

On January 12, 1966, Jack A. Hargraves swore a complaint charging respondent with nine counts of felony before John A. Arguelles, Judge of the Municipal Court of the East Los Angeles Judicial District. The complaint identified Mr. Hargraves as Sergeant of the Los Angeles County Sheriff's Office attached to the forgery division and bore a notation that it had been issued by the Los Angeles County District Attorney under the signature of Deputy District Attorney Leo Chaus (CT 132). Seven of the nine counts alleged forgery of a fictitious name. Each alleged the defrauding of a certain institution and specified the defrauding instrument (CT 124–132). The complaint concluded with a list of officers and agents of those institutions under the heading "witnesses" (CT 132). A warrant directing respondent's arrest issued that same day (CT 123).

Pursuant to that warrant, Sergeant Hargraves arrested respondent at his office in Bell Gardens, California on January 13, 1966 (CT 81–82). Sergeant Hargraves advised respondent of his rights to silence and to counsel adding that he need not give handwriting exemplars (CT 84–85). Officer Hargraves asked respondent if he wished to call an attorney. Respondent stated that he did not (CT 86). Respondent then agreed to and did give the officer a handwriting exemplar (CT 86). Thereafter he was taken

to a Los Angeles Sheriff's station where he gave a second exemplar (CT 86–88).

REASONS FOR GRANTING THE WRIT

I. THE COMPLAINT RELIED UPON BY THE MAGISTRATE BELOW FULLY SATISFIED THE REQUIREMENTS OF THE FOURTH AMENDMENT

A. A Complaint Showing On Its Face That It Was Issued By A District Attorney Who Under State Law May Do So Only When He Has Reasonable Cause To Believe The Person Charged Guilty Of A Crime Is Sufficient To Authorize Issuance Of An Arrest Warrant Even When That Complaint Is Couched In Conclusionary Terms

In declaring the complaint here involved to be insufficient to support the issuance of an arrest warrant, the California Supreme Court relied upon the decisions of this Court in *Giordenello* v. *United States* (1958) 357 U.S. 480; *Aguilar* v. *Texas* (1963) 378 U.S. 108 and *Barnes* v. *Texas* (1965) 380 U.S. 253. Petitioner submits that the California Supreme Court's reading of those cases is in error and that the complaint herein fully satisfied the requirements of the Fourth Amendment as there interpreted.

The key to the *Giordenello-Aguilar-Barnes* view of the requisites for issuance of an arrest warrant appears at page 486 of *Giordenello* v. *United States, supra.* Speaking of the Federal Rules of Criminal Procedure, the Court states:

> "The protection afforded by these Rules, when they are viewed against their constitutional background, is that the inferences from the facts which lead to the complaint '. . . be drawn by a neutral and detached magistrate instead of being judged

> by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson* v. *United States,* 333 U.S. 10, 14. The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime."

This rule was held to be of constitutional scope in *Aguilar* v. *Texas* (1963) 378 U.S. 108, 112 fn 3, and was directly applied to the States in *Barnes* v. *Texas* (1965) 380 U.S. 253.

This Court's precise holding should be carefully noted; it is simply that a magistrate may not issue an arrest warrant *solely* upon a complaint's unsupported conclusion " . . . that the person whose arrest is sought has committed a crime." This Court did *not* hold, nor does it follow, as the California Supreme Court apparently assumed, that a magistrate may issue a warrant of arrest if and only if facts constituting probable cause are set out within the four corners of the supporting document. To the contrary, this Court has always held that if a document presented to a magistrate in support of an application for an arrest warrant shows on its face that a public agency or officer authorized to do so has already found probable cause, an arrest warrant may is-

sue as of course without further inquiry by the magistrate. Thus, in *Giordenello* itself, this Court stated at page 487:

> "A warrant of arrest can be based upon an indictment because the grand jury's determination that probable cause existed for the indictment also establishes that element for the purpose of issuing a warrant for the apprehension of the person so charged."

Closely in point is *Ocampo* v. *United States* (1913) 234 U.S. 91. Following the Fourth Amendment to the Constitution, Section 5 of the Philippine Bill of Rights provided that:

> " . . . no warrant shall issue, but upon probable cause, supported by oath or affirmation . . . ." (32 Stats. 691, 693.)

Another provision of Philippine law allowed a prosecuting attorney to investigate crime and to institute prosecutions by information without a prior preliminary examination by a magistrate (*Ocampo* v. *United States, supra,* pp. 97-98). This procedure was followed in *Ocampo.* An information was filed together with a certificate that the prosecuting attorney had conducted the required investigation. An arrest warrant issued as of course without further inquiry by the magistrate. Plaintiffs in error contended that the procedure conflicted with Section 5 of the Philippine Bill of Rights in that no magistrate or other competent authority had first determined

that there was probable cause (*Ocampo* v. *United States, supra,* p. 93).

This Court rejected that argument stating:

> "It is insisted that the finding of probable cause is a judicial act, and cannot properly be delegated to a prosecuting attorney. We think, however, that it is erroneous to regard this function, as performed by committing magistrates generally, or under General Orders, No. 58, as being judicial in the proper sense. There is no definite adjudication. A finding that there is no probable cause is not equivalent to an acquittal, but only entitles the accused to his liberty for the present, leaving him subject to rearrest. It is expressly so provided by § 14 of General Orders, No. 58, as it is by § 2 of Act 194, above quoted. Such was the nature of the duty of a committing magistrate in the common-law practice, and it is recognized in Rev. Stat., § 1014. *Benson* v. *McMahon,* 127 U. S. 457, 462, 463; *In re Luis Oteiza y Cortes,* 136 U. S. 330, 335; *Todd* v. *United States,* 158 U. S. 278, 283. In short, the function of determining that probable cause exists for the arrest of a person accused is only *quasi*-judicial, and not such that, because of its nature, it must necessarily be confided to a strictly judicial officer or tribunal. By § 9 of the act of July 1, 1902 (32 Stat. 691, 695, c. 1369), Congress enacted: 'That the Supreme Court and the courts of first instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided and such additional jurisdiction as shall hereafter be prescribed by the Government of said Islands, subject to the power of said government

> to change the practice and method of procedure. The municipal courts of said Islands shall possess and exercise jurisdiction as heretofore provided by the Philippine Commission, subject in all matters to such alteration and amendment as may be hereafter enacted by law;' etc. Here we find clear warrant for modifications of the practice and procedure; and since § 5 of the same act (quoted above) does not prescribe how 'probable cause' shall be determined, it is, in our opinion, as permissible for the local legislature to confide this duty to a prosecuting officer as to entrust it to a justice of the peace. Consequently, a preliminary investigation conducted by the prosecuting attorney of the City of Manila, under Act No. 612, and upon which he files a sworn information against the party accused, is a sufficient compliance with the requirement 'that no warrant shall issue but upon probable cause, supported by oath or affirmation'."

(*Ocampo* v. *United States* (1913) 234 U.S. 91, 100–101 see also *Beck* v. *Washington* (1962) 369 U.S. 541, 545.)

Read in the light of *Ocampo,* the *Giordenello-Aguilar-Barnes* rule is that conclusionary allegations, in themselves, will not support a magistrate's issuance of an arrest warrant; but that if the magistrate is satisfied that another competent authority certifies the existence of probable cause, he may issue an arrest warrant even though no facts demonstrating probable cause are directly presented to him.

California Government Code section 26501 provides in part:

> "The district attorney shall institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses when he has information that such offenses have been committed."

The complaint here in question recited that it had been issued by the District Attorney of Los Angeles County and bore the signature of Deputy District Attorney Leo Chaus (CT 132). The magistrate before whom that complaint was laid was entitled to rely on the screening policies of the office of the Los Angeles County District Attorney and to assume that his official duty under Government Code section 26501 had been performed (California Evidence Code section 664). Such reliance is, petitioner submits, full compliance with the Fourth Amendment in light of *Ocampo* v. *United States, supra.*

To read *Giordenello, Aguilar* and *Barnes* as prohibiting such reliance upon a district attorney's prior finding of probable cause and instead to insist that neutral and detached magistrates soberly determine in each instance whether probable cause for arrest exists from the facts before them is to insist upon a chimera. The realities of judicial administration simply will not admit of such a reading.

Most warrants, as with the one in question here, issue from municipal courts. The state of those courts, particularly in the urban areas, was summarized by

the President's Commission on Law Enforcement and Administration of Justice in *Task Force Report: The Courts* at page 31:

> "More than in any other courts in the system the problems of the lower courts center around the volume of cases. It is estimated that in 1962 over 4 million misdemeanor cases were brought to the lower courts of the United States. The crux of the problem is that there is a great disparity between the number of cases and the number of judges.
>
> "Data from various cities illustrate this disparity. For example, until legislation last year increased the number of judges, the District of Columbia Court of General Sessions had four judges to process the preliminary stages of more than 1,500 felony cases, and to hear and determine 7,500 serious misdemeanor cases, 38,000 petty offenses and an equal number of traffic offenses per year. In Detroit over 20,000 misdemeanor and non-traffic petty offense cases must be handled by the single judge sitting in the Early Sessions Division. In Atlanta in 1964 three judges of the Municipal Court disposed of more than 70,000 cases." (Footnotes omitted.)

A case study by the same Task Force of the administration of justice in the Recorder's Court of Detroit is instructive. The task force examined complaint screening procedures of both the court and prosecutor. Of the court, the Task Force stated

> "The complaint and warrant, by their terms, require the judge to examine the complainant prior to the issuance of the warrant. We were informed

that in practice, however, an examination rarely takes place; the judges hurriedly sign warrants before they go on the bench or during pauses in the proceedings. The complaint and warrant forms are phrased in statutory language, and a policeman may swear out a complaint on information and belief. When a complainant does come to the courthouse to sign a complaint, he is rarely brought before the judge who signs the warrant. The only variation on this procedure is that some judges require the person signing the complaint to come to his courtroom to be sworn by his clerk; other judges issue a warrant on any complaint put before them."

The contrast with the screening procedures in the prosecutor's office is startling:

"Cases sent by the police department to the prosecutor's office are initially reviewed by one of several young assistants assigned to perform that function. The Chief Assistant Prosecuting Attorney said that the assistant interrogates the police officer and perhaps the complaining witness about the case; the assistant's primary inquiry concerns the sufficiency of the evidence. He also has some discretion to dispose of cases without prosecution by referral to other agencies, but the discretion apparently is rarely exercised. (Footnote omitted.) The assistant's decision whether or not to recommend a warrant is reviewed by a senior assistant." (*Task Force Report: The Courts, supra,* pp. 132-133.)

The lesson is that to insist that already seriously overburdened lower court magistrates peruse each complaint laid before them for probable cause is an exercise in futility. In fact, the most neutral and detached examination of his case a potential defendant is likely to receive is that which takes place in the young assistant prosecutor's office. The interests of that potential defendant and of the administration of justice would be best served by an opinion of this Court which insured that at least that much of an examination in fact occurs. Such an opinion would clearly hold that the Fourth Amendment is satisfied by a prosecuting attorney's certificate that in his opinion probable cause for the issuance of an arrest warrant exists. A holding to the contrary will serve no end other than to elevate the height of the stack of paper hurriedly shuffled by a magistrate during pauses in the proceedings.

B. In Any Event The Holding Of The California Supreme Court Herein Is Inconsistent With The Holding Of This Court In Jaben v. United States

Even assuming that *Giordenello, Aguilar* and *Barnes* require a determination of probable cause solely by a detached and neutral magistrate, petitioner submits that the complaint herein demonstrates such probable cause and that the California Supreme Court's holding to the contrary is in conflict with this Court's opinion in *Jaben* v. *United States* (1965) 381 U.S. 214.

The California court correctly points out that in *Jaben,* this Court classified the data in a complaint as:

> "(1) that information which, if true, would directly indicate commission of the crime charged, and (2) that which relates to the sources of the directly incriminating information." (*People* v. *Sesslin* (1968) 68 A.C. 431; 67 Cal. Rptr. 409; 439 P.2d 321; Appendix p. 36.)

The California court goes on to hold that the complaint herein did not state:

> "(1) any facts which would support the complainant's belief that defendant had committed any felonies as alleged, or (2) any facts relating to the identity or credibility of the source of the complainant's information." (*People* v. *Sesslin, supra,* Appendix p. 37.)

In so holding, the California Supreme Court ignored the further implications of *Jaben* which are that in a case such as this, the information directly indicating commission of the crime charged may be stated in conclusionary terms and that the sources need not be identified, but need only be stated to have had access to relevant information and be not obviously unreliable.

The complaint in *Jaben* read:

> " 'The undersigned complainant, being duly sworn, states:
>
> " 'That he is a Special Agent of the Internal Revenue Service and in the performance of the duties imposed on him by law, he has conducted an investigation of the Federal income tax liability of

Max Jaben for the calendar year 1956, by examining the said taxpayer's tax return for the year 1956 and other years; by identifying and interviewing third parties with whom the said taxpayer did business; by consulting public and private records reflecting the said taxpayer's income; and by interviewing third persons having knowledge of the said taxpayer's financial condition.

" 'That based on the aforesaid investigation, the complainant has personal knowledge [3] that . . . .' "

(Jaben filed specified fraudulent tax returns). (*Jaben* v. *United States, supra,* pp. 221–222.)

Thus, the *Jaben* complaint simply states that an Internal Revenue Agent conducted an investigation by examining records and talking to unnamed third party business associates and concludes with an allegation of criminality. Yet, this Court upheld this complaint observing that an Internal Revenue Service Agent possesses a certain expertise in tax cases, that such a case does not lend itself to "putative establishment by blunt and concise factual allegations" and that "unlike narcotics informants . . . whose credibility may often be suspect, the (unnamed) sources in this tax evasion case are much less likely to produce false or untrustworthy information (*Jaben* v. *United States, supra,* pp. 223–224, 225).

[3] Despite this statement, it is plain that the complainant's information was wholly founded on hearsay. As this Court observed, the statement that " 'A saw B file a false tax return' does not mean very much in a tax evasion case." (*Jaben* v. *United States, supra,* pp. 223–224).

Here, the complaint, if anything, is more detailed in that the third party sources are named. The complaint herein was sworn to by Jack Hargraves (CT 124). The final page of the complaint identifies said complainant as "Sgt. Jack Hargraves, Sheriff's Forgery, Hall of Justice" (CT 132), thus equivalent expertise is shown. Each of the counts set out in the complaint charges the defrauding of a certain institution and specifies the defrauding instrument. Among the "witnesses" listed at CT 132 are officers and agents of those institutions. It is wholly reasonable that the magistrate below concluded that the information contained in the body of the complaint came from those officers and agents and that by virtue of their positions there was little likelihood of their producing false or untrustworthy information.

In view of the foregoing, petitioner submits that the complaint herein should be construed as reading in effect that:

> Jack Hargraves, of the forgery unit of the Los Angeles County Sheriff's Office conducted an investigation by examining certain records and by speaking with certain named officers of certain business establishments and banks and as a result of said investigation, on information and belief, accuses Gerald Sesslin of a number of counts of forgery.

The resulting similarity to the complaint upheld in *Jaben* is evident; and petitioner therefore submits

that a grant of certiorari is in order to consider the California Supreme Court's erroneous construction of that case.

II. THE COURT HAS YET TO HEAR FULL ARGUMENT ON THE VITAL PRACTICAL AND CONSTITUTIONAL ISSUES WHICH THIS CASE PRESENTS

It may safely be said that in the last decade this Court has worked a revolution in criminal law through landmark decisions in such fields as search and seizure, extrajudicial statements, law enforcement identification techniques and juvenile court procedures (*Mapp* v. *Ohio* (1961) 367 U.S. 643; *Escobedo* v. *Illinois* (1964) 378 U.S. 478; *United States* v. *Wade* (1967) 388 U.S. 218; *In re Gault* (1967) 387 U.S. 1). In each such case, this Court has recognized its undoubted responsibility to hear full argument upon the issues involved and to file an opinion which both resolves those issues and defines practical guidelines for the courts, prosecutors and law enforcement officers whose task it is to implement the rights defined by the Court.

In the vital practical and constitutional area here involved, this Court, while it has spoken, has yet to fulfill that responsibility. As Mr. Justice Mosk pointed out in dissent below,

> "To date no United States Supreme Court case has categorically rejected the California's statutory scheme of permitting a magistrate to exercise his judicial discretion to issue an arrest warrant upon a complaint sworn to on information and belief."

(*People* v. *Sesslin* (1968) 68 A.C. 431, 444; 67 Cal. Rptr. 409; 439 P.2d 321, Appendix p. 47).

Indeed, to date, no decision of this Court sets out a holding on the underlying fundamental issue of whether the Fourth Amendment's proscription applies to State arrest warrants. *Giordenello* v. *United States* (1958) 357 U.S. 480 deals with federal arrest warrants under the Federal Rules of Criminal Procedure and says nothing about State practices. Only dictum in *Aguilar* v. *Texas* (1963) 378 U.S. 108, 112 n. 3, a search warrant case, states that *Giordenello* is of constitutional scope. Finally, *Barnes* v. *Texas* (1965) 380 U.S. 253 is a per curium opinion which does not set out the grounds of decision. A grant of certiorari herein would allow the Court, for the first time, to give full consideration to the fundamental question of whether the Court should deviate from its prior practice to hold that the Fourth Amendment is applicable to the issuance of State arrest warrants.

Further, in *Giordenello v. United States* (1958) 357 U.S. 480, neither party briefed or argued the issue of probable cause (*Giordenello* v. *United States, supra,* p. 492), while in *Barnes* v. *Texas* (1965) 380 U.S. 253, the Court summarily reversed the decision of the Texas Court of Criminal Appeals dealing with arrest warrants without so much as placing the cause on calendar for argument. By granting certiorari

here, the Court can meet its responsibility and clarify the *Giordenello* and *Barnes* decisions as they relate to *Ocampo* v. *United States* (1913) 234 U.S. 91.

Even should the Court reject petitioner's analysis of *Ocampo,* a grant of certiorari would be in order so that this Court could provide the standards and guidelines which would then be required by law enforcement.

In contrast to the relatively small number of search warrants issued throughout the state and nation, the number of arrest warrants issued in felony, misdemeanor and traffic offenses is enormous, running, according to this office's best estimate, to literally hundreds of thousands per year in California alone. The complaints upon which these arrest warrants are issued, as well as the warrants themselves, have, by reason of their great quantity and the element of time, been based largely upon forms. If it is now necessary to make detailed factual allegations in each complaint similar to those required in order to secure a search warrant, the workload of the police, district attorneys and courts throughout the country will be increased multifold. Furthermore, every arrest by warrant will now be subject to attack before and at trial on the basis of alleged formal defects in draftsmanship. Needless to say, this Court's assistance in this area is vital.

On a grant of certiorari, this Court could direct its attention to such practical problems as the degree of specificity to be required. Must, as the California Supreme Court seems to indicate, the identical degree of specificity obtain regardless of the type of crime; or, will the nature of the required allegation vary with the offense? (Compare *Jaben* v. *United States* (1965) 381 U.S. 214).

Extremely serious problems in the vital field of pretrial publicity are raised, but not dealt with, by the Court's summary opinions. The augmented complaints now required will commonly be based on hearsay and other forms of evidence wholly inadmissible at trial (*United States* v. *Ventresca* (1965) 380 U.S. 102). At present, the police and others can be prevented from providing newsmen with such information. In the future, libel-proof public records will themselves be eloquent sources of such highly prejudicial data.

A pressing legal problem left untouched by this Court's opinions is that of retroactivity. Is every criminal case in which an arrest warrant was issued now subject to collateral attack on the basis of the *Giordenello-Barnes* rulings? Petitioner believes that since those opinions do not question the underlying jurisdiction of the trial court to proceed with the case, even after an arrest upon a defective warrant (*Albrecht* v. *United States* (1927) 273 U.S. 1), they

simply define an extension of the Fourth Amendment exclusionary rule and therefore are not retroactive under *Linkletter* v. *Walker* (1965) 381 U.S. 618. This Court's so holding in this case would allay the confusion likely in this area.

Also urgently needed is guidance upon the question of the extent to which the *Giordenello-Barnes* rule will apply to misdemeanors and in particular, to traffic cases. To state that the effects could be paralyzing is not to overstate the issue.

The foregoing does not purport to be an exhaustive list of the questions which the Court might consider appropriate for consideration on taking up this case. The list is rather an attempt to catalog some of the issues which should have been, but were not, considered by this Court in deciding *Giordenello* and *Barnes*. Regardless of their ultimate resolution, the gravity of such legal and practical issues dictates that this Court decide them only after full briefing and argument.

III. RESPONDENT'S FREELY GIVEN CONSENT TO THE TAKING OF THE HANDWRITING EXEMPLARS VITIATED THE EFFECTS OF ANY ILLEGALITY IN THE ARREST PROCEDURE AS A MATTER OF LAW

Finally, petitioner urges that this Court should issue certiorari to consider the holding of the California Supreme Court that an effective and intervening consent sufficient to dissipate any effects of an

illegal arrest is not shown here as a matter of law.

The issue before the California court regarding the admissibility of respondent's handwriting exemplars was defined by this Court in *Wong Sun* v. *United States* (1963) 371 U.S. 471 at page 488:

> " 'Whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' "

As applied in this case, the particular issue is whether respondent's exemplars were the product of his own volition or the product of the illegal restraint.

Petitioner submits that if ever effective and intervening consent were shown, it is in this case. Consider first that the "taint" of the illegality herein is exceedingly slight. The illegality, if present, was purely one of technical and formal nature and entirely unknown to respondent. This case does not involve half a dozen narcotics agents breaking into a bedroom at 6 a.m. (compare *Wong Sun* v. *United States, supra*), rather it involves a police officer's serving an apparently valid warrant upon a businessman at his office during working hours. No improper use of force compounded the illegality as in *Wong Sun*.

Petitioner submits that the relatively slight coercive effects of an outwardly normal arrest were then wholly dissipated by the arresting officer's conduct. Officer Hargraves advised respondent that he was entitled to be silent and to have an attorney. As the First Circuit has held, the substance of such a warning is itself an admonition that the suspect is not in the presence of those acting solely in his interest and that he may refuse to cooperate (*Gorman* v. *United States,* 380 F.2d 158 (1st Cir., 1967).) It should follow that any consent obtained after such an admonition is a product of the suspect's will and not an exploitation of a technical illegality. But is unnecessary to base a determination on this inference alone; for here the officer followed the foregoing admonition with the wholly gratuitous and specific advice that:

> "He did not have to give me any handwriting exemplars, that if he did give me any handwriting exemplars, that they would probably or might be used against him in court in a criminal proceeding." (CT 84–85.)

Petitioner submits that it is difficult to understand how the California Court could fail to find consent, even as a matter of law, in the face of such admonitions given a record which, as Mr. Justice Mosk points out in dissent, contains "not one line of testimony suggesting an absence of consent." (*People* v. *Sesslin, supra,* Appendix, p. 51).

The effect of the California Supreme Court's action is two-fold. First, it tends to discourage the use of scientific detection techniques at a time when this Court is attempting to foster them (compare *Escobedo* v. *Illinois* (1964) 378 U.S. 478); and second it effectively negates that portion of *Wong Sun* which approves an inquiry into attenuation. If attenuation is not shown on these facts, few courts will ever find it within California. Petitioner respectfully submits therefore that the California Supreme Court's holding merits examination upon writ of certiorari.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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DHK:mlh
August 7, 1968
Docket No. LA 67-120

APPENDIX A

STATUTES

EXCERPT FROM "PHILIPPINE BILL OF RIGHTS"

(Act of July 1, 1902, § 5, c. 1369, 32 Stat. 691, 693)

That no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

CALIFORNIA EVIDENCE CODE

SECTION 664:

It is presumed that official duty has been regularly performed. This presumption does not apply on an issue as to the lawfulness of an arrest if it is found or otherwise established that the arrest was made without a warrant.

CALIFORNIA GOVERNMENT CODE

SECTION 26501:

The district attorney shall institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses when he has information that such offenses have been committed. For that purpose, when not engaged in criminal proceedings in the superior court or in civil cases on behalf of the people, he shall attend upon the magistrates in cases of arrest when required by them and shall attend before and give advice to the grand jury whenever cases are presented to it for its consideration.

CALIFORNIA
PENAL CODE

SECTION 470:

Every person who, with intent to defraud, signs the name of another person, or of a fictitious person, knowing that he has no authority so to do, to, or falsely makes, alters, forges, or counterfeits, any charter, letters-patent, deed, lease, indenture, writing obligatory, will, testament, codicil, bond, covenant, bank bill or note, post note, check, draft, bill of exchange, contract, promissory note, due-bill for the payment of money or property, receipt for money or property, passage ticket, power of attorney, or any certificate of any share, right, or interest in the stock of any corporation or association, or any controller's warrant for the payment of money at the treasury, county order or warrant, or request for the payment of money, or the delivery of goods or chattels of any kind, or for the delivery of any instrument of writing, or acquittance, lease, or receipt for money or goods, or any acquittance, release, or discharge of any debt, account, suit, action, demand, or other thing, real or personal, or any transfer or assurance of money, certificate of shares of stock, goods, chattels, or other property whatever, or any letter of attorney, or other power to receive money, or to receive or transfer certificates of shares of stock or annuities, or to let, lease, dispose of, alien, or convey any goods, chattels, lands, or tenements, or other estate, real or personal, or any acceptance or indorsement of any bill of exchange, promissory note, draft, order, or any assignment of any bond, writing obligatory, promissory note, or other contract for money or other property; or counterfeits or forges the seal or handwriting of another; or utters, publishes, passes, or attempts to pass,

as true and genuine, any of the above-named false, altered, forged, or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person; or who, with intent to defraud, alters, corrupts, or falsifies any record of any will, codicil, conveyance, or other instrument, the record of which is by law evidence, or any record of any judgment of a court or the return of any officer to any process of any court, is guilty of forgery.

CALIFORNIA
PENAL CODE

SECTION 487:

Grand theft is theft committed in any of the following cases:

1. When the money, labor or real or personal property taken is of a value exceeding two hundred dollars ($200); provided, that when domestic fowls, avocados, olives, citrus or deciduous fruits, nuts and artichokes are taken of a value exceeding fifty dollars ($50); provided, further, that where the money, labor, real or personal property is taken by a servant, agent or employee from his principal or employer and aggregates two hundred dollars ($200) or more in any 12 consecutive month period, then the same shall constitute grand theft.

2. When the property is taken from the person of another.

3. When the property taken is an automobile, *firearm,* horse, mare, gelding, any bovine animal, any caprine animal, mule, jack, jenny, sheep, lamb, hog, sow, boar, gilt, barrow or pig.

SECTION 995:

The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:

If it be an indictment:

1. Where it is not found, endorsed, and presented as prescribed in this code.

2. That the defendant has been indicted without reasonable or probable cause.

If it be an information:

1. That before the filing thereof the defendant had not been legally committed by a magistrate.

2. That the defendant had been committed without reasonable or probable cause.

APPENDIX B

SUPREME COURT OPINION

OPINION

The PEOPLE, Plaintiff and Respondent
v.
Gerald SESSLIN, Defendant and Appellant
Cr. 11519
Supreme Court of California
In Bank
April 10, 1968

Hollopeter & Terry and Don H. Terry, Pasadena, for defendant and appellant.

Thomas C. Lynch, Atty. Gen., Daniel J. Kremer and August J. Ginocchio, Deputy Attys. Gen., for plaintiff and respondent.

TOBRINER, Justice.

An information charged defendant and Frank Harper with seven counts of forgery and two counts of grand theft. Defendant and Harper waived trial by jury and stipulated that the trial judge decide the case on the transcript of the preliminary hearing. The trial court found defendant guilty of one count of forgery and dismissed the other eight counts against defendant. Defendant appeals.

We hold that (1) an arrest warrant issued solely upon the complainant's "information and belief" cannot stand if the complaint or an accompanying affidavit does not allege underlying facts upon which the magistrate can independently find probable cause to arrest the accused; (2) sections 806, 813, and 952 of the Penal Code do not authorize the issuance of war-

rants of arrest based solely upon complaints couched in the language of the charged offense and therefore do not violate the Fourth Amendment; (3) handwriting exemplars taken incidental to an illegal arrest are inadmissible; (4) the admission of defendant's handwriting exemplars constituted prejudicial error.

On January 12, 1966, Police Officer Hargraves signed a nine-page felony complaint.[1] On the same day, a judge of the municipal court issued a warrant for the arrest of defendant and Harper. On the next day Officer Hargraves, acting pursuant to the warrant, arrested defendant in his office. Hargraves advised defendant of his right to counsel and his right to remain silent and further informed him that he did not have to give any handwriting exemplars. At Har-

[1] The first page of the complaint states: "*Jack Hargraves* of the County of Los Angeles who, being first duly sworn on oath, upon information and belief complains and says: That on or about the *16th* day of *December, 1965,* at and in the county of Los Angeles, State of California the crime of *Forgery of Fictitious Name,* in violation of Section 470, Penal Code, a felony was committed by *Gerald Sesslin and Frank Wesley Wright Harper* who, at the time and place last aforesaid, did wilfully, unlawfully, fraudulently and feloniously make, pass, utter and publish a certain fictitious check and order in writing for the payment of money in the sum of *Four Hundred fifty-seven and 00/100 Dollars $457.00* knowing said check to be fictitious, as aforesaid, with intent then and there to cheat and defraud *Nellie Allen, Commerce Bank, and Handy Payments,* a corporation. Said complainant therefore prays that a warrant may be issued for the arrest of the defendant who may then be dealt with according to law." The italicized portions are those filled in by the complainant Hargraves. The rest of the complaint is a printed form. Each of the remaining eight pages of the complaint relates to one of the remaining eight counts, regarding other fictitious checks allegedly made and passed by defendant and Harper. Each page duplicates the first page of the complaint except for differences in the amount of the check involved and the names of the persons allegedly defrauded. Page 3 of the complaint relates to the $5,800 check which served as the basis of defendant's conviction.

graves' request, however, defendant wrote out an exemplar. Later, at the police station, he gave further exemplars.

An expert witness testified that the handwriting on the exemplars and the handwriting on the forged $5,800 check were executed by the same person. This testimony comprised the only evidence establishing that defendant signed the fictitious name on the check. Although defendant offered timely objections to the admissibility of the exemplars, the trial court permitted their introduction on the ground that the prosecution obtained them as an incident to a valid arrest and during defendant's legal detention.

I.

[1] The Fourth Amendment requires that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation."[2] In Giordenello v. United States (1958) 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503, the United States Supreme Court held that a complaint which merely stated the affiant's conclusions

[2] The California Constitution and the Penal Code contain similar provisions. Article I, section 19 of the California Constitution states that "* * * no warrant shall issue, but on probable cause, supported by oath or affirmation, * * *" Section 813 of the Penal Code provides: "When a complaint is filed with a magistrate charging a public offense originally triable in the superior court of the county in which he sits, if such magistrate is satisfied from the complaint that the offense complained of has been committed and that there is *reasonable ground to believe that the defendant has committed it*, he must issue a warrant for the arrest of the defendant. * * *" (Italics added.)

couched in the words of the statute [3] cannot support a valid arrest warrant. Justice Harlan said: "The purpose of the complaint, then, is to enable the appropriate magistrate, * * * to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime. * * * [Here] the complaint contains no affirmative allegation that the affiant *spoke with personal knowledge of the matters contained therein;* it does not *indicate any sources for the complainant's belief;* and it does not set forth *any other sufficient basis upon which a finding of probable cause could be made.*" (Italics added.) (Id. at 486, 78 S.Ct. at 1250.)

Although the Attorney General correctly points out that *Giordenello* rested on the federal rules of criminal procedure applicable to a federal prosecution, Aguilar v. State of Texas (1964) 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723, grounded these rights in the Constitution. In that case, which involved a search warrant issued by a Texas justice of the peace, the United States Supreme Court said, "The principles announced in *Giordenello* derived, therefore, from the Fourth Amendment, and not from our supervisory power." (Id. at 112 fn. 3, 84 S.Ct. at 1513.) The court also determined that Ker v. State of California (1963)

[3] The complaint in *Giordenello* stated: "The undersigned complainant [Finley] being duly sworn states: That on or about January 26, 1956, at Houston, Texas in the Southern District of Texas, Veto Giordenello did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code."

374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726, which stated that "the standard of reasonableness is the same under the Fourth and the Fourteenth Amendments," (374 U.S. at 33, 83 S.Ct. at 1630) "must certainly be read as holding that the standard for obtaining a search warrant is likewise 'the same under the Fourth and Fourteenth Amendments.'" (378 U.S. at 110, 84 S.Ct. at 1512.)

Aguilar held that, "although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, * * * the magistrate must be informed of [1] some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and [2] some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, * * * was 'credible' or his information was 'reliable.' Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime,' Giordenello v. United States." (Id. at 114–115, 84 S.Ct. at 1514.)

In Barnes v. Texas (1965) 380 U.S. 253, 85 S.Ct. 942, 13 L.Ed.2d 818, in a case involving an arrest warrant, the Supreme Court in a per curiam opinion cited *Giordenello* and *Aguilar* as the sole basis for reversal of the conviction.[4] *Barnes* demonstrates that

[4] The Texas Court of Criminal Appeals held the following warrant valid on the assumption that *Giordenello* did not apply to the states: "That heretofore, to-wit: on or before the 29th day of May, A.D. 1962, and before the making and filing of this Complaint, in the County of Lubbock and State of Texas, Billy Joe Barnes and Johnny Leach did then and there unlawfully and fraudulently take from the possession of Southwestern Bell Telephone Company herein called 'owner' good and lawful

Giordenello and *Aguilar* must be read together as formulating the requirements of the Fourth Amendment for valid arrest as well as search warrants, and that the standards set forth in *Giordenello,* as clarified in *Aguilar,* United States v. Vantresca (1965) 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 and Jaben v. United States (1965) 381 U.S. 214, 85 S.Ct. 1365, 14 L.Ed.2d 345, apply to the states through the Fourteenth Amendment. (Ker v. State of California, supra, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726.)

In *Jaben* the United States Supreme Court classified the types of factual showing required to meet the constitutional standards. In that case, which involved a summons ordering the defendant to appear at a preliminary hearing, the Supreme Court said that "Information in a complaint alleging the commission of a crime falls into two categories: (1) that information which, if true, would directly indicate commission of the crime charged, and (2) that which relates to the source of the directly incriminating information." (381 U.S. at 223, 85 S.Ct. at 1370.) This classification directly parallels and clarifies the two types of underlying circumstances which *Aguilar* held that a

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United States currency of the value of over Fifty and No/100 ($50.00) dollars, the same then and there being the corporeal personal property of the said 'owner,' from the possession of the said 'owner' without the consent of the said 'owner,' and with the intent then and there to deprive the said 'owner' of the value of the same, and to appropriate same to the use and benefit of them, the said Billy Joe Barnes and Johnny Leach against the peace and dignity of the State." (Barnes v. State (1964) Tex.Cr.App., 390 S.W.2d 266, 269.)

The complaint in *Barnes,* like the complaints here and in *Giordenello,* is defective in that it merely sets forth the terms of the statute violated and does not allege any underlying facts from which a magistrate could conclude that there was probable cause to believe that the defendant had committed the alleged offense.

complaint must state in order to support a valid search warrant under the Fourth Amendment.

[2, 3] If such a complaint, supporting an arrest warrant, does not allege the two types of facts delineated by *Aguilar* and *Jaben,* the warrant fails and an arrest made pursuant to it is illegal. (Barnes. v. Texas, supra, 380 U.S. 253, 85 S.Ct. 942, 13 L.Ed.2d 818.)[5] Here the complaint did not state (1) any facts which would support the complainant's belief that defendant had committed any felonies as alleged, or (2) any facts relating to the identity or credibility of the source of the complainant's information.

[4] The Attorney General's attempt to distinguish this complaint from those held insufficient to support a valid arrest warrant in *Giordenello* and *Barnes* on the basis that the complaint concludes with a list of "Witnesses" thus misses the mark. The complaint did not allege that any of the listed persons were the source of the information upon which the complainant relied in seeking a warrant for defendant's arrest, or allege any facts connecting defendant with the charged forgeries as to which the "witnesses" could testify. That a number of persons can testify to the crimes alleged in a complaint does not constitute the type of allegation which enables a "neutral and detached" magistrate *independently* to determine on the basis of the evidence before him that probable cause supports the arrest of the person charged in the com-

[5] The record contains no evidence that Officer Hargraves had probable cause to arrest defendant. We therefore need not reach the question whether there are circumstances under which an arrest made pursuant to an invalid warrant may nonetheless be legal. (Cf. People v. Chimel, 68 Cal.2d —, 67 Cal.Rptr. 421, — P.2d —.)

plaint. (Aguilar v. State of Texas, supra, 378 U.S. at 109 fn. 1, 111–115, 84 S.Ct. 1509; Giordenello v. United States, supra, 357 U.S. at 486–487, 78 S.Ct. 1245.)

II.

[5, 6] California's statutory scheme authorizing the issuance of arrest warrants does not violate the Fourth Amendment. When the relevant provisions (Pen.Code, §§ 806, 813, and 952)[6] are read together and con-

[6] Section 806 provides: "A proceeding for the examination before a magistrate of a person on a charge of an offense originally triable in a superior court must be commenced by written complaint under oath subscribed by the complainant and filed with the magistrate; * * * Such complaint *may be verified on information and belief.*" (Italics added.)

Section 952 provides: "In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement * * * *may be in the words of the enactment describing the offense* * * *." (Italics added.)

Section 813 provides that a magistrate *must* issue a warrant for the arrest of the defendant "if such magistrate is satisfied from the complaint that the offense complained of has been committed and that there is reasonable ground to believe that the defendant has committed it."

Section 813 does not explicitly state that a magistrate may *not* issue an arrest warrant if the complaint does not allege sufficient facts from which he can independently determine that there is probable cause to arrest the defendant. (Cf. Giordenello v. United States, supra, at 486, 78 S.Ct. 1245.) Moreover, the Penal Code nowhere prescribes the contents of a complaint which would *require* the issuance of an arrest warrant under section 813. As the Attorney General points out, however, reliance in the past has been placed on sections 806 and 952 to determine the nature of the complaint sufficient to obtain a warrant under section 813. Although such reliance contravenes the *Giordenello-Aguilar* rule, sections 806 and 952 are not thereby rendered unconstitutional. Sections 806 and 952 directly relate to accusatory complaints, not complaints to support a warrant. *Giordenello-Aguilar* merely teaches that we not construe these sections to provide that complaints drawn in compliance with them are automatically sufficient to support a valid arrest warrant.

strued in light of *Giordenello-Aguilar,* they meet the constitutional test. A complaint based on "information and belief" and couched in the statutory language of the alleged offense may support a valid arrest warrant *if* the complaint alleges sufficient facts for the magistrate to conclude that probable cause supports the warrant in that the allegations indicate (1) the commission of the crime by the person whose arrest is sought, and (2) the reliability of the information and credibility of its source.

[7] Section 813 of the Penal Code provides that the magistrate *must* issue an arrest warrant if he "is satisfied from the complaint" that "there is reasonable ground" to arrest the defendant. *Giordenello-Aguilar* requires that the magistrate may issue an arrest warrant *only if* he is satisfied from the complaint that there is probable cause to arrest the defendant. The statutory mandate does not conflict with the constitutional standard; the former must be construed in light of the latter. So interpreted, section 813 provides in effect that an arrest warrant *shall issue if and only if,* "such magistrate is satisfied from the complaint that the offense complained of has been committed and that there is reasonable ground to believe that the defendant has committed it."

[8] That the complaint is based on "information and belief" rather than personal knowledge of the affiant (§ 806), or phrased in terms of the statutory language of the alleged offense (§ 952) does not resolve the issue. The crucial factor lies not in the form of the allegations, but in the sufficiency of the facts alleged "to enable the appropriate magistrate, * * * to determine whether the 'probable cause' re-

quired to support a warrant exists." (Giordenello v. United States, supra, 357 U.S. at 486, 78 S.Ct. at 1250; Aguilar v. Texas, supra, 378 U.S. at 115, 84 S.Ct. at 1514.)

III.

[9, 10] The admission into evidence of the handwriting exemplars procured after defendant's arrest and during his illegal detention violated his rights under the Fourth Amendment. The state may not use evidence to convict an accused which it obtained by exploiting an illegal arrest or detention. (Wong Sun v. United States (1963) 371 U.S. 471, 484–485, 83 S.Ct. 407, 9 L.Ed.2d 441; Mapp v. Ohio (1961) 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081; Silverthorne Lumber Co. v. United States (1920) 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319; People v. Stoner (1967) 65 Cal.2d 595, 598, 55 Cal. Rptr. 897, 422 P. 2d 585; People v. Bilderbach (1965) 62 Cal. 2d 757, 763, 44 Cal. Rptr. 313, 401 P.2d 921; People v. Cahan (1955) 44 Cal. 2d 434, 445–450, 282 P.2d 905, 50 A.L.R.2d 513.)

In People v. Bilderbach, supra, 62 Cal. 2d at 766, 44 Cal.Rptr. 313, 401 P.2d 921, we held that Ker v. State of California, supra, 374 U.S. 23, 83 S.Ct. 1623, 10 L. Ed.2d 726, required us to apply the test in Wong Sun v. United States, supra, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441, to determine the admissibility of evidence obtained as a result of an illegal arrest, search, or seizure. Here the police obtained a handwriting exemplar shortly after arresting defendant at his office pursuant to an invalid warrant and then required further exemplars after taking him to the police station. As we explained in *Bilderbach,* the Supreme Court in *Wong Sun* held that an illegal arrest imme-

diately preceding the procurement of evidence "rendered [that evidence] inadmissible as the 'fruit' of the agents' illegal action. * * * Under such circumstances it is unreasonable to infer that [defendant's] response was sufficiently an act of free will to purge the primary taint of the unlawful invasion." (62 Cal.2d at 765, 44 Cal.Rptr. at 317, 401 P.2d at 925.) The handwriting exemplars were thus "come at by exploitation of [the] illegality" (Wong Sun v. United States, supra, 371 U.S. at 488, 83 S.Ct. at 417) of the arrest and detention. The admission of the exemplars would therefore "thwart the laudable policies underlying the exclusionary rule." (People v. Bilderbach, supra, 62 Cal. 2d at 768, 44 Cal. Rptr. at 319, 401 P.2d at 927; see also Bynum v. United States (1959) 104 U.S.App.D.C. 368, 262 F.2d 465, 466–467; State v. Miller (1966) 76 N.M. 62, 412 P.2d 240, 244.)

We find no basis upon which to conclude that the connection between the exemplars and the illegal arrest has "become so attenuated as to dissipate the taint." (People v. Bilderbach, supra, 62 Cal.2d at 766, 44 Cal. Rptr. at 318, 401 P.2d at 926.) As the Supreme Court explained in *Wong Sun,* "not * * * all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' " (371 U.S. at 488, 83 S.Ct. at 417.)

[11, 12] That degree of "attenuation" which suffices to remove the taint from evidence obtained directly as a result of unlawful police conduct requires at least an intervening independent act by the defendant or a third party which breaks the causal chain linking the illegality and evidence in such a way that the evidence is not in fact obtained "by exploitation of that illegality." Consent by the defendant, if "sufficiently an act of free will to purge the primary taint of the unlawful [arrest]" (Wong Sun v. United States, supra, 371 U.S. at 486, 83 S.Ct. 416), may produce the requisite degree of "attenuation."

The prosecution urges that there was an intervening act of free will between the illegal arrest and the procurement of the handwriting exemplars that dissipated the taint of the primary illegality. The trial court, however, made no finding that the prosecution sustained its burden[7] of showing that defendant freely gave the exemplars. (See People v. Bilderbach, supra, 62 Cal.2d 757, 763, 44 Cal.Rptr. 313, 401 P.2d 921; cf. People v. Henry (1967) 65 Cal.2d 842, 846, 56 Cal. Rptr. 485, 423 P.2d 557).

[13] Moreover, on the basis of the record before us we could not characterize as unreasonable an inference that the connection between the illegal arrest and the procurement of the exemplars lacked the requisite attenuation. Defendant produced the first exemplar shortly after the illegal arrest. This illegality tends to vitiate any claimed consent in two respects: (1) the arresting officer secured entry to defendant's office under the purported authority of a warrant, and the

[7] Castaneda v. Superior Court (1963) 59 Cal.2d 439, 443–444, 30 Cal.Rptr. 1, 380 P.2d 641; People v. Gorg (1955) 45 Cal.2d 776, 782, 291 P.2d 469.

entry may have been essential to obtaining consent; (2) the consent may have been dictated by an implied assertion of authority by the officer. (See People v. Haven (1963) 59 Cal.2d 713, 31 Cal.Rptr. 47, 381 P.2d 927.)

[14] We have noted, supra Officer Hargraves' testimony that prior to obtaining the first exemplar he informed defendant that he had a right to remain silent, a right to counsel at all stages of the proceedings, and a right not to give any handwriting exemplars.[8] Since the rendition of exemplars does not amount to self-incrimination within the meaning of the Fifth Amendment, these warnings were not required for the protection of defendant's Fifth Amendment rights. (Gilbert v. State of California (1967) 388 U.S. 263, 266–267, 87 S.Ct. 1951, 18 L.Ed.2d 1178; People v. Graves (1966) 64 Cal.2d 208, 210–211, 49 Cal.Rptr. 386, 411 P.2d 114.) We must consider, however, whether the officer's advice and defendant's response makes unreasonable as a matter of law the inference that the officer secured the incriminating evidence through exploitation of his violation of defendant's Fourth Amendment rights.

The rendition of similar advice, as an added safeguard to insure defendant's voluntary waiver of his constitutional rights, does not, in itself, preclude application of the *Wong Sun* exclusionary rule. Thus in

[8] Hargraves advised defendant "that he was entitled to remain silent, that he did not have to tell this investigator anything or answer any questions that I might ask, that he was entitled to an attorney at all stages of the proceedings, including that interview and any interview I might have with him, that he did not have to give me any handwriting exemplars, that if he did give me any handwriting [exemplars], that they would probably or might be used against him in court in a criminal proceeding."

People v. Bilderbach, supra, 62 Cal.2d 757, 44 Cal.Rptr. 313, 401 P.2d 921, defendant contended that his confession was inadmissible both because the record did not indicate that the officers had complied with the requirements of People v. Dorado (1965) 62 Cal.2d 338, 42 Cal.Rptr. 169, 398 P.2d 361, and because the confession constituted the "fruit" of an illegal search. We held that even in the event that the prosecution upon retrial could establish that defendant intelligently waived his *Dorado* rights prior to giving the confession, the trial court would still be required to determine whether the taint from the illegal search had been dissipated.[9] In *Wong Sun* itself, the United States Supreme Court had to determine whether Wong Sun's confession was the "fruit" of an illegal arrest. In its statement of facts the court noted that prior to his confession an agent of the Narcotics Bureau had advised him of his right to counsel and his right to remain silent. (371 U.S. at 476, 83 S.Ct. 407.) In holding that the illegal arrest did not taint the confession, the court, however, relied solely "[o]n the evidence that Wong Sun had been released on his own recognizance after a lawful arraignment, and had returned several days later to make the statement * * *." (p. 491, 83 S.Ct. p. 419.) We conclude, therefore, that although the advice given in the instant case may be a factor showing an intervening act of free will (cf. People v. Stoner, supra, 65 Cal.2d 595, 600, 55 Cal.Rptr. 897, 422 P.2d 585), it does not in isolation demonstrate as a matter of law the requisite attenuation.

[9] We noted that "[e]ven though statements are free of 'opressive circumstances' and otherwise voluntarily rendered, they are not exempt from attack on constitutional grounds if they are the product of an illegal search." (People v. Bilderbach, supra, 62 Cal.2d 757, 767, 44 Cal.Rptr. 313, 319, 401 P.2d 921, 927.)

[15] Defendant furnished the second set of exemplars while illegally detained and with the knowledge that the People already had one sample of his handwriting. "[T]he compulsion inherent in custodial surroundings" (Miranda v. State of Arizona (1966) 384 U.S. 436, 458, 86 S.Ct. 1602, 1619, 16 L.Ed.2d 694), especially when considered in conjunction with the prior illegality obtained exemplar (see Fahy v. State of Connecticut (1963) 375 U.S. 85, 90–91, 84 S.Ct. 229, 11 L.Ed.2d 171; People v. Spencer (1967) 66 Cal.2d 158, 163–168, 57 Cal.Rptr. 163, 424 P.2d 715), precludes our holding as a matter of law that the prosecution sustained its burden of showing that defendant freely consented to the officers' procurement of the second set of exemplars.

If the question of the admissibility of the exemplars should arise upon retrial, the prosecution and the defense may introduce further evidence bearing on this question. (Cf. People v. Doherty (1967) 67 A.C. 1, 9 fn. 7, 59 Cal.Rptr. 857, 429 P.2d 177; People v. Green (1965) 63 Cal.2d 561, 565, 47 Cal.Rptr. 477, 407 P.2d 653.) In such event, the trial court will determine the admissibility of the exemplars upon its examination of the facts in accordance with the above principles.

The prosecution's only evidence that defendant signed the forged check consisted of the handwriting expert's testimony that the signature on the check and the handwriting exemplars were executed by the same person. The admission into evidence of the handwriting exemplars obtained in violation of defendant's rights under the Fourth Amendment therefore constituted prejudicial error.

In sum, in holding that an arrest warrant issued solely upon the complainant's "information and be-

lief" cannot stand if the complaint or accompanying affidavit does not allege underlying facts upon which the magistrate can independently find probable cause to arrest the accused, we do no more than apply constitutional principles long held and clearly expressed by the decisions of the United States Supreme Court. To do less would be to expose our ruling to the unanswerable charge of constitutional infirmity.

The judgment is reversed.

TRAYNOR, C. J., and PETERS and SULLIVAN, JJ., concur.

MOSK, Justice (dissenting).

I dissent.

Taking the majority conclusions seriatim, I would hold that (1) an arrest warrant based on the complainant's information and brief is valid; (2) sections 806, 813, and 952 of the Penal Code have consistently and reasonably been interpreted in practice as authorizing the issuance of warrants of arrest based upon complaints couched in the language of the charged offense, and the sections are not violative of the Fourth Amendment; (3) handwriting exemplars are admissible regardless of whether they are taken before or after arrest and the nature of the arrest itself is irrelevant; (4) the admission of defendant's handwriting exemplars was neither error nor prejudicial.

Penal Code, section 806 specifically authorizes complaints sworn to on the information and behalf of the affiant. As a result, a practice has developed among California law enforcement officers of preparing and signing complaints on information and belief, and in so doing the officers on occasion merely employ the language of the criminal statute allegedly violated.

This has been deemed appropriate under accepted interpretations of Penal Code, sections 806, 813, and 952. No California case has held to the contrary, although all three statutes have been in the code since its adoption in 1872.

Authorities relied upon by the majority are distinguishable. Giordenello v. United States (1957) 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503, involved the supervisory power of the federal courts in applying rule 4(a) of the Federal Rules of Criminal Procedure to federal prosecutions. Aguilar v. State of Texas (1963) 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 considered the specificity requirements and legality of a warrant to search and not to arrest. To date no United States Supreme Court case has categorically rejected California's statutory scheme of permitting a magistrate to exercise his judicial discretion to issue an arrest warrant upon a complaint sworn to on information and belief. In this state *a judicial function,* the magistrate's discretion, is involved in issuance of the warrant of arrest; the complaint is merely an accusatory pleading and the beginning, not necessarily the end, of the magistrate's inquiry. The process is seldom *pro forma* in practice. It is not uncommon for the magistrate to informally interrogate the complainant at length before issuance of the arrest warrant. He must be *satisfied* as to the sufficiency of the complainant's information and belief before exercising his judicial authority (Pen.Code, § 813). Since Barnes v. Texas (1965) 380 U.S. 253, 85 S.Ct. 942, 13 L.Ed.2d 818, is merely a per curiam opinion, it is not persuasive authority upon which to base categorical rejection of our generally accepted practice. Indeed, the majority concede in section II of their opinion that California's statutory scheme

authorizing the issuance of arrest warrants does not violate the Fourth Amendment. I agree generally with their rationale and completely with their conclusion. Since the officers and the magistrate complied with the statutes, the absence of constitutional infirmity in the process should compel us to conclude that the warrant issued here was valid.

Nevertheless, I would join the majority in a caveat to law enforcement agencies for the future. While a complaint may be sworn to on information and belief, it is preferable out of an excess of caution that the complaint briefly indicate the underlying circumstances—the factual information—upon which the belief is based that a violation of law occurred and that the person whose arrest is sought committed the crime.

Even if we were to agree *arguendo* that the arrest warrant here was fatally defective, we would be obliged, under the authority of People v. Bilderbach (1965) 62 Cal. 2d 757, 44 Cal. Rptr. 313, 401 P.2d 921, to exclude only that evidence obtained as the direct and proximate result of the illegal arrest. The test, devised in Wong Sun v. United States (1963) 371 U.S. 471, 487, 83 S.Ct. 407, 417, 9 L.Ed.2d 441, is "whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by *exploitation* of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." (Italics added.)

Thus if the officers, using the faulty warrant, had seized existing objects from the person or immediate constructive possession of the defendant at the time of the arrest, as the contraband in *Bilderbach,* or had extracted a statement from him, as in *Wong Sun,* such

objects or statement would necessarily be denied evidentiary consideration. That is not the case at bench. No evidence was taken here in "exploitation" of an illegal warrant.

Nevertheless the majority find "no basis upon which to conclude that the connection between the exemplars and the illegal arrest has 'become so attentuated as to dissipate the taint' " and they further explain that by "attenuation" they mean "at least an intervening independent act by the defendant or a third party which breaks the causal chain linking the illegality and evidence." They concede that consent by the defendant would provide such intervening act necessary to produce the requisite degree of attenuation.

Accepting the concession that freely given consent purges the taint of an allegedly unlawful arrest under *Wong Sun,* I find it difficult thereafter to follow the labyrinthine course to the majority's conclusion, for no one has heretofore raised any serious issue of the defendant's consent having been freely given.

The handwriting exemplars were obtained by officers during a process of interrogating the defendant in his office. The officers advised him of his constitutional rights as prescribed in Escobedo v. State of Illinois (1964) 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977, and People v. Dorado (1965) 62 Cal.2d 338, 42 Cal.Rptr. 169, 398 P.2d 361.[1] There can be no denial

[1] This case came to trial on June 20, 1966, one week after the effective date of the rule in Miranda v. State of Arizona (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. (See Johnson v. State of New Jersey (1966) 384 U.S. 719, 86 C.Ct. 1772, 16 L.Ed.2d 882.) However, at that time defendant and his counsel stipulated in open court that the cause he submitted on the testimony contained in the transcript of proceedings had at the preliminary hearing. The preliminary examination took place on January 28 and February 1, 1966, at which time *Escobedo-Dorado* and not *Miranda,* was the rule in effect. Had

that adequate *Escobedo-Dorado* admonitions were given and were directly related to the request for handwriting exemplars.[2]

After being given appropriate *Escobedo-Dorado* admonitions, and declining a proffered opportunity to telephone his counsel, the defendant waived his rights and willingly submitted handwriting exemplars. Unquestionably the waiver was knowingly made; the defendant was not a naive victim of police imposition.[3] This case involves a knowledgeable defendant in the familiar, comfortable environment of his own business office; elements in the shrewdly devised plot were a $5,800 check, and elaborate efforts to enmesh an official of a banking institution in the check-passing fraud.

In giving *Escobedo-Dorado* warnings under these circumstances, the officers were more cautious and solicitous of defendant than current authority requires. This court held in People v. Graves (1966) 64 Cal.2d 208, 49 Cal.Rptr. 386, 411 P.2d 114, that such admonitions need not be given as a prerequisite to obtaining handwriting exemplars. We reasoned (at p. 211, 49 Cal.Rptr. at p. 388, 411 P.2d at p. 116) there is "no support in *Escobedo* for invoking the right to counsel

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counsel later desired to invoke *Miranda*, he had two subsequent opportunities to seek relief from his stipulation: on June 20, 1966, the court continued the case to August 5, 1966, and on that date to August 15, 1966. On the latter date defendant was found guilty of count 3, and the remaining counts were ordered dismissed for insufficiency of the evidence.

[2] See footnote 8, majority opinion, for the quotation from Deputy Sheriff Hargraves' testimony. In addition, at another point the officer testified, "I asked him if he wished to call an attorney, and he stated that he did not wish to do so at that time."

[3] Most familiar in this law enforcement field is the saga of the hapless wino who passes a rubber check to his friendly bartender in a neighborhood pub. This is clearly not such a case.

to block scientific crime investigation. Reliance on handwriting exemplars for expert analysis is not a substitute for thorough scientific investigation of crime but an excellent example of such investigation. To preclude the police from asking for such exemplars would foster reliance instead on the very inquisitorial methods of law enforcement that *Escobedo* deems suspect." (Fn. omitted.)

The *Escobedo-Dorado* admonitions, though not compulsory under the *Graves* doctrine, clearly provided that "intervening independent act" which the majority require to break the causal chain between the arrest they find invalid and the obtaining of the exemplars. Thus even under the formidable standards prescribed by the majority, the exemplars were admissible.

I would not have reached that point, however. Although generally the physical evidence seized pursuant to an arrest depends upon the legality of the arrest to justify its seizure, the taking of exemplars, fingerprints, blood samples, photographs, and similar devices received their legitimacy independently as part of approved scientific law enforcement investigatory processes (People v. Graves, supra, 64 Cal.2d 208, 211, 49 Cal.Rptr. 386, 411 P.2d 114; 8 Wigmore on Evidence (McNaughton rev. 1961) § 2265).

The prosecution met its burden of showing that the defendant freely gave the handwriting exemplars on both occasions. The police officers so testified. The record discloses no hint of conflict on the issue, for there is not one line of testimony suggesting an absence of consent. Thus the majority rely solely upon the time element, stressing that the first exemplars were given "shortly after the illegal arrest." Whether the exemplars were given before, during or after

arrest is wholly irrelevant, if not given in exploitation of an illegal arrest and if there was an independent intervening act between the purportedly illegal arrest and the writing of the exemplars. As I have shown, the *Escobedo-Dorado* admonitions were such independent intervention.

Finally, the majority opinion contains no supportable rationale whatever for excluding the second set of exemplars taken at a later time at the sheriff's station, other than reference to the "compulsion inherent in custodial surroundings." That issue was settled two years ago in *Graves,* where exemplars taken in the police department offices and again later while defendant was in custody were held admissible in evidence.

The admission of the handwriting exemplars was not error, and consequently not prejudicial. Therefore, I would affirm the judgment.

McCOMB and BURKE, JJ., concur.

APPENDIX C

DISTRICT COURT OF APPEAL OPINION

OPINION

The PEOPLE, Plaintiff and Respondent,
v.
Gerald SESSLIN, Defendant and Appellant,
Cr. 13155
Court of Appeal, Second District,
Division 1.
June 28, 1967
Hearing Granted Sept. 21, 1967.

Hollopeter & Terry and Don H. Terry, Pasadena, for defendant and appellant.

Thomas C. Lynch, Atty. Gen., Daniel J. Kremer and August J. Ginocchio, Deputy Attys. Gen., for plaintiff and respondent.

WOOD, Presiding Justice.

Defendant and one Harper were accused in seven counts of forgery and in two counts of grand theft. In a nonjury trial, defendant was found guilty on one count of forgery ($5,800.00 check), and the other counts were dismissed. Defendant appeals from the judgment.

Appellant contends that he was arrested pursuant to an invalid warrant of arrest; and, therefore, that exemplars of his handwriting, made at the request of officers after his arrest, were obtained by illegal search and were not admissible in evidence.

It was stipulated that the People's case might be submitted on a transcript of the preliminary examination; and that the exhibits received in evidence at said

examination might be received in evidence at the trial.

During the riots in Watts in 1965, a large number of checks and money orders were stolen from various business establishments in that area. Two of the checks, for $4,575.00 and for $5,800.00, which were drawn on banks outside California, were deposited in an account in the Commerce City Bank in the City of Commerce, California, in order to facilitate payment from the account before the checks would "clear" the drawee bank. It is not disputed that those two checks were forged.

On November 27, 1965, Mr. Applegate, an officer of the Commerce City Bank, received a telephone call from the defendant who was a customer of the bank. Defendant asked Mr. Applegate whether he "wanted to earn some money." Defendant also said that he could not "discuss it on the phone," and asked Mr. Applegate to come to his (defendant's) house on Pine Street in Bell Gardens.

Mr. Applegate went to the house about 6:30 p. m. and defendant told him that a woman would come into the bank with cashier checks "from all over the country" and would deposit them in the bank; and that if Mr. Applegate would accept them without putting a "hold" on the funds, then he (Applegate) could "make two thousand bucks and some more later."

About December 1, 1965, Mr. Applegate received another telephone call wherein the defendant referred to the "deal"; and Mr. Applegate replied that he did not want any part of it.

About December 12, 1965, the check for $5,800.00, payable to the order of Carol Owen, and purportedly signed by Norman Whitt as drawer, was deposited in

an account at the bank in the name of Wallace C. King. The name "Wallace King" was written on the back of the check, and a deposit slip presented with the check was signed, "Wallace C. King."

On January 12, 1966, Jack A. Hargraves, a police officer, signed a felony complaint, consisting of nine pages. The first page of the complaint is in substance as follows: Jack Hargraves, being first duly sworn on oath, upon information and belief complains and says that on December 16, 1965, in the County of Los Angeles, the crime of forgery of fictitious name in violation of section 470 of the Penal Code was committed by Gerald Sesslin and Frank Wesley Wright Harper, who at said time and place, did wilfully, unlawfully, fraudulently and feloniously make, pass, utter and publish a certain fictitious check and order in writing for the payment of money in the sum of $457.00 knowing said check to be fictitious, with intent then and there to cheat and defraud Nellie Allen, City of Commerce Bank, and Handy Payments.

Each of the remaining eight pages of the complaint (pages 2 through 9) relates to one of the remaining eight counts, regarding other fictitious checks allegedly made and passed by defendant and Harper. Each page contains statements similar to those on page 1, except that the amount of the check involved and the names of the persons allegedly defrauded are different. Page 3 relates to the $5,800.00 check, and states that defendant and Harper made, passed, uttered and published said check with intent to defraud and cheat Betty Guth, City of Commerce Bank, and Central National Bank, Oklahoma City.

On January 12, 1966, a judge of the municipal court issued a warrant of arrest, directed to any peace officer of the state, which warrant recites in part as follows: Complaint on oath having this day been laid before me that the crime of "470 PC (7 cts) and 487 PC (2 cts)" has been committed, and accusing defendant Gerald Sesslin thereof, you are therefore commanded forthwith to arrest the above named defendant.

On January 13, 1966, the defendant was arrested pursuant to the warrant, while he was at his office. He was advised that he had a right to remain silent; that he was entitled to an attorney; and that anything he said could be used against him in court. The arresting officers asked defendant whether he would give them a handwriting exemplar. Defendant replied in the affirmative, and gave the officers an exemplar of his handwriting. Several hours later, defendant made another exemplar at the police station.

A handwriting expert testified that the handwriting on the exemplars, the signature (Wallace King) on the back of the $5,800.00 check, the signature (Wallace C. King) on the deposit slip, and numerals appearing on the check and on the deposit slip, had been made by the same person.

Appellant contends that he was arrested pursuant to an invalid warrant of arrest; and, therefore, that exemplars of his handwriting made at the request of officers after his arrest were obtained by illegal search and were not admissible in evidence. He asserts that the complaint is defective in that it is made upon the information and belief, and not upon the personal knowledge, of Officer Hargraves; that the complaint does not designate the name of the informant or the source of the officer's information and belief; and that

the complaint does not state facts, but states "merely conclusions of law" couched in the words of the statute (Pen.Code, § 470), as a basis for probable cause for issuance of the warrant.

Section 806 of the Penal Code provides in part as follows: "A proceeding for the examination before a magistrate of a person on a charge of an offense originally triable in a superior court must be commenced by written complaint under oath subscribed by the complainant and filed with the magistrate. *Such complaint may be verified on information and belief.* * * *" (Italics added.) Section 813 of the Penal Code provides that "if such magistrate is satisfied from the complaint that the offense complained of has been committed and that there is reasonable ground to believe that the defendant has committed it, he must issue a warrant for arrest of the defendant." (See Witkin, Cal. Criminal Procedure, § 97, p. 98.) Thus, the Legislature has expressly provided that the complaint may be made upon the information and belief of the complainant.

Appellant asserts, in effect, that such legislation permitting a complaint to be made upon information and belief is unconstitutional—that decisions of the United States Supreme Court require that the complaint be made upon the personal knowledge of the complainant and that the complainant disclose in the complaint the source of his information. Citing Barnes v. State of Texas, 380 U.S. 253 [85 S.Ct. 942, 13 L.Ed. 2d 818]; Aguilar v. State of Texas, 378 U.S. 108 [84 S.Ct. 1509, 12 L.Ed.2d 723]; Giordenello v. United States, 357 U.S. 480 [78 S.Ct. 1245, 2 L.Ed.2d 1503].)

In the *Barnes* case (cited in oral argument herein), the decision in a memorandum case was as follows:

"The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is reversed. Giordenello v. United States, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503; Aguilar v. State of Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723."

In the *Aguilar* case, officers seized narcotics pursuant to a search warrant which was issued upon submission by the officers of the following affidavit: "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." (378 U.S. 108, at 109, 84 S.Ct. 1509, at 1511.) The Texas Court of Criminal Appeals ruled that the narcotics were properly received in evidence. The United States Supreme Court held (p. 115, 84 S.Ct. p. 1514) that the search warrant should not have been issued because the affidavit did not provide a sufficient basis for a finding of probable cause. With reference to personal knowledge of the affiants and disclosure of the source of their information, the Supreme Court said (p. 114, 84 S.Ct. p. 1514): "Although an affidavit may be based on hearsay information and *need not reflect the direct personal observations of the affiant*, Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697, 78 A.L.R.2d 233, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, *whose identity need not be disclosed*, see Rugendorf v. United States, 376 U.S. 528, 84 S.Ct.

825, [11 L.Ed.2d 887,] was 'credible' or his information 'reliable.' " [Italics added.] (See People v. Talley, 66 Cal.2d —, —,[a] 56 Cal. Rptr. 492, 423 P.2d 564.)

[1] In the present case, the complaint, which Officer Hargraves made upon information and belief as permitted by section 806 of the Penal Code, consists of nine pages and includes (1) references to the dates and amounts of the fictitious checks which were allegedly made and passed by defendant and Harper, (2) the places where the checks were made and passed, and (3) the names of the persons whom defendant and Harper intended to defraud. The complaint was not defective by reason of its having been made upon information and belief, rather than upon personal knowledge or observations of the complainant. The complainant was not required to disclose specifically in the complaint the source of his information. Such sources presumably were the persons whose names appear in the complaint as being the persons whom defendant and Harper intended to defraud. The complaint contains sufficient information with regard to the fictitious checks to establish probable cause for the issuance of the warrant of arrest. The warrant was valid.

[2] Furthermore, it does not appear that any question as to the validity of the warrant was relevant to the question of admissibility in evidence of the handwriting exemplars. After the defendant had been arrested and advised of his rights to counsel and to remain silent, he voluntarily made handwriting exemplars at his office soon after he was arrested, and

[a] Advance Report Citation: 66 A.C. 363, 373.

at the police station several hours later. (See People v. Graves, 64 Cal.2d 208 [49 Cal.Rptr. 386, 411 P.2d 114].) It has been held (People v. Zavala, 239 Cal.App.2d 732, 738 [49 Cal.Rptr. 129]) that the giving of a Nalline test to a defendant does not violate his privilege against self-incrimination or the constitutional provisions against unreasonable search.

The judgment is affirmed.

FOURT and LILLIE, JJ., concur.

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